92-1080

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM STEPHENSON,

Petitioner,

v.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure should be granted when a subsequent Supreme Court decision makes it clear that the lower court erred in entering summary judgment initially and the aggrieved person has exhausted his appellate rights prior to the subsequent decision by the Supreme Court.

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OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is an unpublished opinion and is included in the Appendix starting at Appendix p. 1. The decision of the United States District Court for the District of Maryland is unreported and is included in the Appendix starting at Appendix p. 8.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on September 28, 1992. Jurisdiction to review this judgment by writ of certiorari is conferred on the Supreme Court pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 26, 1986, William Stephenson ("Stephenson") was injured in the course

of his employment with McLean Contracting Company ("McLean") on a bridge construction project on the Choptank River. He was regularly assigned to work on the Annapolis, a crane barge that was being used to construct the support structure for the bridge columns traversing the Choptank River. On the day of his injury, Stephenson had been temporarily assigned to another crane barge owned by the Defendant, the Newport News and was assigned to work inside a cofferdam, a boxlike structure constructed to keep water from the river out of the work area. Stephenson sustained serious and permanent injuries when he slipped on a beam inside the cofferdam and fell to the concrete floor of the cofferdam.

Stephenson filed suit in the U.S. District Court for the District of

Maryland under the Jones Act. McLean moved for summary judgment arguing that Stephenson was not a seaman for purposes of the Jones Act. Initially, the motion was denied and the case proceeded to trial. After hearing two days of testimony, the District Court reversed its prior ruling and granted Defendant's summary judgment motion. In its written opinion, the court relied on Whittington v. Sewer Construction Co., 541 F.2d 427 (4th Cir. 1976). In Whittington, the Court of Appeals for the Fourth Circuit set out the following three-prong test for determining whether a worker is a "seaman" for coverage under the Jones Act: (1) whether the worker is "more or less permanently attached to a vessel or fleet"; (2) whether the vessel or fleet is "in navigation"; and (3) whether the

worker's "duties serve naturally and primarily as an aid to navigation in the broadest sense" (emphasis added).

The District Court assumed that Stephenson satisfied the first and second prongs of the Whittington test, but the court ruled that the third prong was not satisfied because Stephenson's duties considered in the aggregate, did not primarily serve as an aid to navigation. The court stated that Stephenson was not primarily engaged in moving the Annapolis or otherwise contributing to a transportation function of the barge.

Aggrieved with the decision of the District Court, Stephenson appealed to the Court of Appeals for the Fourth Circuit. In a brief per curiam opinion decided December 23, 1988, the Fourth Circuit affirmed. Stephenson v. McLean Contracting

Co., 863 F.2d 340 (4th Cir. 1988). The Fourth Circuit agreed with the District Court that Stephenson did not satisfy the test set forth in Whittington, stating: "[W]e think it is clear that the duties of Stephenson did not 'serve naturally and primarily as an aid to navigation in the broadest sense.'" Stephenson also petitioned the Fourth Circuit for a rehearing, which was denied on February 2, 1989.

Believing that the lower courts improperly interpreted the Jones Act as to require a worker to be involved in the transportation-function of a vessel, Stephenson petitioned the Supreme Court for certiorari. In his petition for certiorari, Stephenson argued that one need not be involved in the transportation function of the vessel to be covered under

the Jones Act and that the District Court improperly injected this requirement in Stephenson. Stephenson also argued the conflict that existed among the federal circuits. The Supreme Court denied the petition on May 22, 1989, although Justice White would have granted certiorari. Stephenson v. McLean Contracting Co., 109 S.Ct. 2110 (1989).

On February 19, 1991, the Supreme Court in McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807 (1991), addressed the criteria for determining seaman status under the Jones Act, and resolved a conflict that had developed in the lower courts. Certiorari in McDermott was filed on March 20, 1990, less than nine months after Stephenson's petition for certiorari was denied. In its opinion, the Supreme Court unanimously held that one need not

aid in the navigation of a vessel in order to qualify as a seaman under the Act. After an exhaustive analysis of the history and legislative intent of the Jones Act, the Court expressly rejected the concept that a worker has to perform transportation-related functions to be covered under the Jones Act. The Supreme Court traced the history of the Jones Act and determined that the Act had never required that a seaman aid in navigation. The Court held that it was only necessary that an employee be on-board a vessel in furtherance of its purpose.

On April 30, 1991, Stephenson filed a motion pursuant to Fed. R. Civ. P. 60(b), requesting the District Court reopen the judgment in light of the McDermott decision. The lower court denied the

motion[1], and the Court of Appeals for the Fourth Circuit affirmed.

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[1] It is interesting to note the lower court's comments in another admiralty case handled by petitioner's attorneys, Yoash v. McLean Contracting Company, Civil No. JFM-88-2797 (D. Md.), which this Court granted certiorari and remanded in light of McDermott. 111 S. Ct. 1068 (1991). In Yoash, the lower court indicated the view that McDermott was misguided if this Court "intended to extend Jones Act remedies to persons who are essentially construction workers, exposed to no greater hazards than are their counterparts working on the adjacent land...." Memorandum dated November 14, 1991 which is included in the Appendix starting at page 25. The lower court also indicated its reluctance to conclude whether a crane barge is a "vessel in navigation." It is submitted that these comments demonstrate the lower court's proclivity towards a limited interpretation of the Jones Act. In exercising discretion whether to re-open a judgment, the lower court would therefore be reluctant to re-open a judgment when the underlying claim is based on the Jones Act.

REASONS FOR GRANTING WRIT

In Polites v. United States, 364 U.S. 426 (1960) the issue of whether a subsequent change in the law would entitle one to relief from judgment under Rule 60(b) was before the Supreme Court. The Court, however, did not address the issue because the Court determined that the decision relied on by the petitioner did not alter the law controlling the petitioner's case. In the present case, the reasons are very compelling to grant certiorari because the subsequent McDermott decision squarely addressed the point of law that was relied upon in granting summary judgment against Stephenson. Moreover, the Supreme Court in McDermott indicated what the scope of the Jones Act had been from its enactment. Thus, more is involved in the present case

than just a mere change in the law because the Supreme Court in McDermott stated what the law had always been.

The case of United States v. Mandel, 672 F. Supp. 864 (D. Md. 1987), aff'd, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989) is instructive on this significant nuance. Judge Smalkin, in light of McNally v. United States, 107 S.Ct. 2875 (1987), set aside the conviction for mail fraud and racketeering of former Governor Marvin Mandel ten years after he was convicted and eight years after the Supreme Court denied certiorari. Although a criminal case in which the writ of coram nobis was used, the decision is important because the case did not involve a subsequent change in the law, but rather a later clarification of what the law had always been. This is precisely the

situation with Stephenson and the subsequent McDermott decision. The District Court in Mandel noted: "[b]ecause the Supreme Court was interpreting the statute in light of its legislative history and intent, obviously static properties of the statute, the reach of the statute has logically been as narrow as McNally's interpretation since the day of its enactment." Mandel, 672 F. Supp. at 873.

Even if it is considered that McDermott was a subsequent change in the law, the lower courts are in conflict whether a subsequent change is a sufficient basis for granting relief under Rule 60(b). See generally, Comment, Federal Rule of Civil Procedure 60(b): Standards for Relief from Judgment Due to Changes in Law, 43 U.Chi.L.Rev. 646 (1976).

In Tsakonites v. Transpacific Carriers Corp., 332 F. Supp. 722 (S.D.N.Y. 1970), a case factually similar to that of Stephenson, the U.S. District Court for the Southern District of New York addressed a Rule 60(b) motion in a Jones Act case. The plaintiff in Tsakonites brought suit under the Jones Act, and the District Court rendered a decision that the plaintiff's contacts with the United States were insufficient to justify the application of the Jones Act. Plaintiff appealed the decision to the Court of Appeals, but the decision was affirmed. On a petition for rehearing, the Court of Appeals en banc decided against the plaintiff. Plaintiff then filed a petition for a writ of certiorari in the Supreme Court. The petition was denied on April 17, 1967. On June 8, 1970 the

Supreme Court decided Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970), which overruled the rationale relied upon by the District Court in dismissing Tsakonites' case. In light of the Rhoditis decision, Tsakonites moved the District Court under Rule 60(b) that the previous dismissal of his suit be vacated. The District Court vacated the original judgment, stating: "I believe it to be in the interest of justice in the exceptional circumstances of this case to grant Tsakonites his day in court now that the Supreme Court appears to have overruled the previous decisions against him." Tsakonites, 322 F. Supp. at 725.

The Third and Tenth Circuits would permit a 60(b) motion when there is a subsequent change of the law. In Wilson v. Fenton, 684 F.2d 249, 251 (3rd Cir. 1982)

the court of appeals noted that "a decision of the Supreme Court of the United States or a Court of Appeals may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion." In Wilson, however, the court determined that the Supreme Court case relied upon by petitioner was inapplicable to his case. The Court of Appeals for the Tenth Circuit in Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989) was more definitive, stating that "a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)."

The Court of Appeals for the Eight Circuit in Cox v. Wyrick, 873 F.2d 200, 201 (8th Cir. 1989) indicated that a "change in the law having retroactive application may, in appropriate

circumstances, provide the basis for granting relief under Rule 60(b)." (emphasis added).

The Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have indicated that change in decisional law is not enough to warrant relief under Rule 60(b). Travelers Indem. Co., v. Sarkisian, 794 F.2d 754 (2nd Cir. 1986); Nunnery v. Barber, 23 Fed.R.Serv.2d 232 (4th Cir. 1977); Bailey v. Ryan Stevedoring Co., Inc. 894 F.2d 157, 160 (5th Cir. 1990), cert. denied, 111 S.Ct. 89. ("A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment."); Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952); McKnight v. United States Steel Corp., 726 F.2d 333 (7th Cir. 1984);

Carter v. Romines, 593 F.2d 823 (8th Cir. 1979); Tomlin v. McDaniel, 865 F.2d 209 (9th Cir. 1989). Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987), cert. denied, 483 U.S. 1010 (1987)(Something more than a "mere" change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. The court, however, went on to find that there were significant factors to warrant relief under 60(b)(6).

Justice in an individual case must prevail over finality of judgments. Stephenson sustained permanent and serious injuries and was precluded from his day in court merely because his case pre-dated McDermott and because of an improper interpretation of the Jones Act by the district court and the Court of Appeals

for the Fourth Circuit.[2] Stephenson has not been dilatory in pursuing his claim. He did everything that was in his power to obtain a proper result before the judgment became final. He fully exhausted his appeal rights and pursued his claim all the way to the Supreme Court.

Stephenson simply has not had a fair opportunity to present his claim, and will always be precluded from doing so unless this Court grants certiorari to address the important issues presented. Stephenson merely asks for the opportunity to present his case and have it decided under the

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[2] In light of McDermott, the Supreme Court granted certiorari and remanded another Jones Act case of Stephenson involving a prior shoulder injury. Stephenson v. McLean Contracting Co., 111 S.Ct. 1615 (1991). Thus, his shoulder injury case was allowed to proceed, while his more serious injury involved in this petition has not. This inconsistency highlights the extraordinary circumstances presented in Stephenson's case.

proper standard for determining seaman status under the Jones Act. The Supreme Court in McDermott has affirmatively removed the hurdle incorrectly applied to Stephenson by the lower courts.

In that there is a conflict as to whether a change in the law constitutes the extraordinary circumstances justifying relief under Rule 60(b)(6), guidance is need from the Supreme Court to resolve the inconsistent results in the lower courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be granted.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

N. 91-2637

WILLIAM STEPHENSON,

Plaintiff-Appellant,

v.

McLEAN CONTRACTING COMPANY, INC.,

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-87-587-JFM).

Argued: May 6, 1992
Decided: September 28, 1992

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed by unpublished opinion.

OPINION

PER CURIAM:

William Stephenson appeals the district court's denial of his FED. R. Civ. P. 60(b) motion to reopen a prior judgment in this case. Finding no abuse of discretion, we affirm the judgment of the district court.

Stephenson, an employee of McLean Contracting Company, was injured while working on a bridge construction project on the Choptank River. The district court determined that Stephenson had no claim under either the Jones Act, 46 U.S.C. App. § 688(a), or the maritime doctrine of unseaworthiness, and granted summary judgment to McLean. This decision was premised on the finding that, under Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976), Stephenson was not a

"seaman" for purposes of the Jones Act because his duties at the time of injury did not serve naturally and primarily as an aid to navigation in the broadest sense. Stephenson v. McLean Contracting Co. 702 F.Supp. 552, 554 (D. Md. 1988).

We affirmed the district court's decision, agreeing "that the plaintiff failed to present evidence that he was a seaman within the test set forth in Whittington." Stephenson v. McLean Contracting Co., 863 F.2d 340, 341 (4th Cir. 1988), cert. denied, 490 U.S. 1085 (1989). Subsequently, the Supreme Court held, contrary to Whittington, that one need not aid in the navigation of a vessel to qualify as a seaman under the Jones Act. McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807, 816-18 (1991).

Two months after the decision in

McDermott, Stephenson filed his Rule 60(b) motion for relief from the district court's earlier judgment because that decision was at odds with McDermott. The district court found that Stephenson had not demonstrated extraordinary circumstances warranting relief, and denied the motion. It is from that decision that Stephenson appeals.

Stephenson did not premise his motion upon a specific subsection of Rule 60(b). However, we agree with McLean and the district court that the motion is properly construed as brought pursuant to Rule 60(b)(6), which provides relief for "any other reason justifying relief from the operation of the judgment." This is particularly true in light of our conclusion that Nunnery v. Barber, 23 Fed. R. Serv. 2d 232 (4th Cir.), vacated on

other grounds, 25 Fed. R. Serv. 2d 856 (4th Cir. 1977), is persuasive in the subject appeal.

In Nunnery, as in the present case, the issue was "whether Rule 60(b)(6) authorizes relief from a judgment on the ground that the rule of law applied by the court has been subsequently overruled or declared erroneous in another unrelated proceeding." Nunnery v. Barber, 23 Fed. R. Serv. 2d at 233. In 1973, the district court dismissed Nunnery's complaint for failure to state a claim. Nunnery had alleged that she was dismissed from a job for patronage purposes in violation of the First and Fourteenth Amendments. We affirmed the district court's decision. Nunnery v. Barber, 503 F.2d 1349, 1359-60 (4th Cir. 1974), cert. denied, 420 U.S. 1005 (1975).

Subsequently, in Elrod v. Burns, 427 U.S. 347 (1976), the Supreme Court held, contrary to our holding in Nunnery, 503 F.2d 1349, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments. Id. at 373. Nunnery then filed a Rule 60(b) motion in the district court, asking that the court's earlier decision be vacated in light of Elrod.

The district court denied the motion on jurisdictional grounds, and Nunnery applied to this Court for leave to direct the district court to decide her motion. After disposing of the jurisdictional question, we held that because our final judgment in Nunnery preceded Elrod by more than one year and because Elrod contained no indication that the Supreme Court intended its holding to be applied

retroactively, there was no reason to grant relief under Rule 60(b)(6). Nunnery v. Barber, 23 Fed. R. Serv. 2d at 234. Accord: Hall v. Warden, Maryland Penitentiary, 364 F.2d 495 (4th Cir. 1966) (en banc).

In the present case, as in Nunnery, this Court's prior decision preceded the Supreme Court's decision in McDermott by more than one year. Similarly, there is no suggestion in McDermott that the Supreme Court intended its decision to have retroactive effect. We see no difference between the facts of Nunnery and those of Stephenson's case that would justify a different result.

Accordingly, because the district court did not abuse its discretion in denying relief, we affirm the decision of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON	*	
v.	*	
MCLEAN CONTRACTING COMPANY	*	CIVIL NO. JFM-87-587
	*	

****

MEMORANDUM

On March 26, 1986, William E. Stephenson was injured while working for McLean Contracting Company ("McLean") on a bridge construction project on the Choptank River. He thereafter instituted an action in this court, asserting claims under the Jones Act, 46 U.S.C. § 688. I granted a motion for summary judgment filed by McLean on the ground that Stephenson was not a "seaman" within the meaning of the Jones Act. This decision was based upon a finding that Stephenson

did not satisfy the third prong of the test established by Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976), in that his "duties, considered in the aggregate, did not primarily serve as an aid to navigation." Stephenson v. McLean Contracting Co., JFM-87-587, slip op. at 4 (D. Md. Apr. 20, 1988) (emphasis added).

Stephenson filed an appeal. In a per curiam opinion, the Fourth Circuit affirmed on the ground that Stephenson did not "'serve naturally and primarily as an aid to navigation in the broadest sense.'" Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988) (citations omitted). Stephenson petitioned the Fourth Circuit for a rehearing, which was denied on February 2, 1989. He then petitioned the Supreme Court for a writ of certiorari. That petition was denied on

May 22, 1989. Stephenson v. McLean Contracting Co., 460 U.S. 1085 (1989).

On February 19, 1991, the Supreme Court in McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807 (1991), resolved a conflict among the circuits on the question of the criteria for determining seaman status under the Jones Act. In its opinion, the Supreme Court unanimously held that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Act.

On April 30, 1992, Stephenson filed a motion pursuant to Fed. R. Civ. P. 60(b), requesting that I reopen my judgment on the ground that the McDermott decision demonstrates that I erred by applying the "aid in navigation" test.

Because I do not find that Stephenson has shown the existence of the unique and

exceptional circumstances necessary to support Rule 60(b)(6) relief, I will deny his motion.

I.

A Rule 60(b) (6) motion -- the "catch-all" clause of Fed. R. Civ. P. 60(b) upon which Stephenson appears to be relying -- provides for relief from judgment "for any other reason" not mentioned in other clauses of the Rule. The motion is addressed to the sound discretion of the trial court. See, e.g., Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977). In determining whether to exercise the power to relieve a judgment under this provision, a court "must engage in the delicate balancing of 'the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be

done in light of all the facts.'" Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979) (quoting Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir. 1970), cert. denied, 399 U.S. 927 (1970) (emphasis in original)). The Supreme Court decisions which confront Rule 60(b) (6) echo these central considerations and demonstrate that relief from final judgment under this section requires a showing of "extraordinary circumstances." See, e.g., Polites v. United States, 364 U.S. 426 (1960) (denying relief from revocation of citizenship because intervening change was not substantial enough); Ackermann v. United States, 340 U.S. 193 (1950) (denying relief from revocation of citizenship despite later favorable appellate ruling in similar case because

petitioner made "deliberate choice" not to appeal); Klapprott v. United States, 335 U.S. 601 (1949) (granting relief from four year-old default judgment procured while petitioner was ill and wrongfully incarcerated).

As Stephenson urges, some courts have recognized that an intervening change in the law may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion, in order to remedy an error in the application of the law. See, e.g., Wilson v. Fenton, 684 F.2d 249, 251 (3d Cir. 1982); Fackelman v. Bell, 546 F.2d 734, 736 (5th Cir. 1977); Pierce v. Cook & Co., 518 F.2d 710, 722-23 (10th Cir. 1975), cert denied, 423 U.S. 1079 (1976); Ritter v. Smith, 811 F.2d 1398, 1401 (11th Cir. 1987), cert. denied, 483 U.S. 1010 (1987). However, the cases in which

courts found that an intervening Supreme Court decision provided the basis for granting the Rule 60(b) (6) motion involved facts which rendered such an intervening decision "unique", "exceptional", or "extraordinary."

For example, the Ritter court regarded the fact that the Supreme Court decision there at issue was decided expressly for the purpose of resolving the dispute between that case and Ritter rendered the "circumstances sufficiently extraordinary to justify disturbing the finality of the judgment." Ritter, 811 F.2d at 1402. See also Tsakonites v. Transpacific Carriers Corp., 322 F. Supp 722 (S.D.N.Y. 1970). Courts have also found extraordinary circumstances where the intervening Supreme Court decision decided a case which arose out of the same transaction as

the one on motion. In Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), the court found Rule 60(b) (6) relief appropriate because the intervening decisional change came in a case arising out of the exact same accident as that in which the plaintiffs in Pierce were injured.

This court has followed this rule in recognizing that in extraordinary situations a change in law may warrant Rule 60(b) (6) relief. See Atwell v. Equifax, Inc., 86 F.R.D. 686 (D. Md. 1980). At the same time this circuit has recognized that the need for finality means that a change in a rule of law is insufficient by itself to warrant reopening a final judgment. See, e.g., Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 229 (4th Cir. 1981) (unique

circumstances necessary to disturb final judgment); Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979) (same); Nunnery v. Barber, 23 Fed.R. Serv.2d 232 (4th Cir. 1977) (same). See also E.E.O.C. v. Baltimore & Ohio R. Co., 557 F. Supp. 1112 (D. Md. 1983) (extraordinary circumstances present where case involved 142 wrongfully terminated employees and where "justice would be served").

II

As Stephenson describes in his memoranda, until the Supreme Court decided McDermott a few months ago, the lower federal courts followed two different approaches for determining coverage under the Jones Act. Under the test established for seaman status in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), the

worker had to demonstrate that the performance of his duties contribute to the function of a vessel or to the accomplishment of its mission. The Seventh Circuit established its more stringent test in Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985), which held that seaman status for Jones Act purposes may only be conferred on employees who make "a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." Id. at 1063. This is essentially the same test which the Fourth Circuit had earlier adopted in Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976). The Supreme Court granted certiorari in McDermott expressly to resolve the

conflict between the Robison and the Johnson tests on the issue of the transportation/navigation requirement. See McDermott, 111 S.Ct. at 810.

In reaching its decision to reject the Johnson aid in navigation requirement, the Supreme Court traced the history of the Jones Act, its application, and its relation to the Longshore and Harbor Workers' Compensation Act (LHWCA). After an exhaustive analysis of its decisions, other courts' decisions, and the legislative history of the Jones Act, the Court found that the aid in navigation language picked up by the Seventh Circuit and other courts arose out of an erroneous distinction between the Jones Act and the LHWCA:

> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based

> and sea-based maritime employees. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that "seaman" had been taken to include land-based employees. There is no indication...that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation.

McDermott, 111 S.Ct. at 817. In sofinding, the Court held that the worker's particular job is not determinative, but rather "[t]he key to seaman status is employment-related connection to a vessel," id., noting that this determination in a particular case is a question for the jury which must be decided on the particular nature of the vessel and the employee's precise relation to it.

Stephenson argues that the decision in McDermott did not change the law, but rather represents a clarification of the

law, and that his motion should thus be judged by a more favorable standard. Stephenson does not cite any authority to support this proposition and, at least under the facts of this case, the distinction he draws is a matter of semantics. The elimination of the aid in navigation required can be seen either as an evolution or as a clarification of the law, depending upon one's predilections. Regardless of the label put upon it, however, Stephenson cannot be relieved under Rule 60(b) (6) unless he demonstrates that McDermott represents an extraordinary circumstance sufficient to disturb the final judgment entered against him.

Stephenson emphasizes that he is not using Rule 60(b) as a substitute for appeal. That is certainly true. He not

only appealed my ruling to the Fourth Circuit but also thereafter petitioned the Supreme Court for a writ of certiorari on the very issue now in question. That petition was denied, however. Although the Supreme Court has subsequently granted certiorari and remanded other Jones Act cases, these remands all occurred in the wake of McDermott.[1] To treat Stephenson's case differently from those cases is not at all inappropriate. It merely gives rise to the same disparity which necessarily exists whenever a question of retroactive application of a Supreme Court decision is presented. Stephenson has no more standing to complain than would, say, a criminal defendant who may have raised

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[1] Stephenson points out that his lawyer handled three of those cases. That fact, of course, is entirely irrelevant.

the issue of the improper use of peremptory jury strikes but whose case had been finally decided when the Supreme Court's decision in Batson v. Kentucky,, 476 U.S. 79 (1986) was rendered.[2] See Griffith v. Kentucky, 476 U.S. 314 (1987) (Batson applied retroactively only to cases pending on direct review or not yet final at time of Batson decision).

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[2] It might be noted that although Stephenson argues that judgment would not have been entered against him under McDermott, this is not entirely clear. Of course, the aid in navigation prong of the test would not have been applied. However, Stephenson's "precise" connection to the vessel on which he was working at the time of his injury was never fully analyzed as would be required under McDermott. Thus, matters may not be quite as cut and dried as Stephenson contends. While this fact is by no means dispositive, it does suggest the importance of applying a bright line retroactivity rule which is suspended only in genuinely extraordinary cases.

A separate order denying Stephenson's motion is being entered herewith.

Date: July 9, 1991

/s/
J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON	*	
v.	*	
MCLEAN CONTRACTING COMPANY	*	CIVIL NO. JFM-87-587
	*	

****

ORDER

For the reasons stated in the memorandum entered herein, it is this 9th day of July, 1991

ORDERED that William E. Stephenson's motion for relief from judgment is denied.

/s/
J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL J. YOASH	*	
v.	*	Civil No. JFM-88-2797
MCLEAN CONTRACTING CO.	*	

****

MEMORANDUM

Plaintiff, Paul J. Yoash, has sued McLean Contracting Co. ("McLean"), a maritime construction contractor, under the Jones Act, 42 U.S.C. App. § 1988, for injuries he sustained on board McLean's crane barge CAPE FEAR during construction of the Choptank River Bridge.

In July 1989 I granted a motion for summary judgment filed by McLean on the ground that the record established that Yoash was not a seaman within the meaning of the Jones Act. The Fourth Circuit ruling was upheld. Yoash v. McLean

Contracting Co., 907 F.2d 1481 (4th Cir. 1990). However, Yoash petitioned the Supreme Court for a writ of certiorari and by an order dated February 25, 1991, the Court granted certiorari, vacated the judgment and remanded the case to the Fourth Circuit for further consideration in light of the decision in McDermott Int'l. Inc. v. Wilander, 111 S. Ct. 807 (1991). Yoash v. McLean Contracting Co., 111 S. Ct. 1068 (1991). The Fourth Circuit has in turn remanded the case to me.

I.

McLean has again moved for summary judgment on the ground that Yoash is not a seaman. McLean's motion will be denied.

In granting McLean's prior summary judgment motion, I ruled that Yoash was not a seaman as a matter of law because

his duties on board the CAPE FEAR did not contribute to the "transportation function" of the barge. In McDermott the Supreme Court rejected the test which I applied. The Court held that "it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel" and that "the key to seaman status is employment-related connection to a vessel in navigation." McDermott, 111 S. Ct. at 817.

McLean's present argument is based upon the Supreme Court's favorable citation in McDermott of a law review article by Professor David W. Robertson. Id. (citing David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985)). The Court cited this article in support of the statement that "[a]ll who work at sea in the service of a

ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." McDermott, 111 S. Ct. at 817. In his article Professor Robertson proposed a new formulation for determining seaman status. Under that formulation a worker would qualify as a seaman "(1) when a substantial part of his duties are performed on vessels, and (2) his work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable waters." Robertson, supra, at 120.

McLean urges that applying that test here Yoash is not a seaman because he was not exposed "to the perils of the sea." Frankly, I would like to accept this argument. I am of the view that if the

Court's decision in McDermott was intended to extend Jones Act remedies to persons such as Yoash, who essentially are construction workers, exposed to no greater hazards than are their counterparts working on the adjacent land, the decision was misguided. There simply is no sound policy reason why such workers should, instead of receiving worker's compensation benefits, be afforded liberal maritime remedies traditionally designed to protect "blue-water" seaman exposed to the perils of the sea. However, I am not persuaded that the Court's citation of Professor Robertson's article in support of a rather general statement signal an intention to adopt his proposed formulation. Rather, I am forced to conclude that the Court merely adopted a two-part test requiring that the vessel in

question be one in navigation and that the worker's employment be connected to that vessel's work. E.g., McDermott, 111 S. Ct. at 817.

II.

McLean's second contention is that the CAPE FEAR was not a "vessel in navigation." I have wavered on this issue before. Compare Presley v. Healy Tibbits Constr. Co., 646 F. Supp. 203, 206 (D. Md. 1986) (finding that a crane barge is not a vessel in navigation) with Stephenson v. McLean Contracting Co., 702 F. Supp. 552, 554 (D. Md. 1988) (questioning the validity of the Presley holding).

A.

The relevant facts are as follows. The CAPE FEAR carries a "whirly crane," a large revolving crane designed especially for maritime construction. The barge is

equipped with spuds, steel legs which are lowered to the riverbed to keep the barge stationary during work. It has no conventional power of self-propulsion but by means of deck winches can move along its anchor lines. The barge can also move by using the crane to "cast" the buoys from which the anchor lines are suspended. Generally, however, the CAPE FEAR must be towed in order to move distances greater than the length of the anchor lines.

The CAPE FEAR's primary function at the Choptank site was driving piles. It was also used to place concrete caps on completed bridge columns. When the barge was setting caps, unlike pile driving, the spuds were not lowered due to the listing that resulted from the weight of the caps. To coordinate pile driving with cap-setting work, the CAPE FEAR had to move

back and forth across the Choptank, a distance averaging about one mile. Depending on the work to be done, the barge might move as often as three times in one day or might remain stationary for several days. When moving, the CAPE FEAR usually stayed within a half-mile of the column line of the bridge. Only once during Yoash's employment did the CAPE FEAR leave the Choptank jobsite. The barge was moved to an anchorage in Trappe Creek, approximately 10-12 miles distant, to take shelter from an approaching hurricane.

On October 15, 1985, Yoash sustained the injuries for which he sues while the crew of the CAPE FEAR was preparing to move the barge. At the time of the accident, he was walking across the deck to reach a winch. Apparently, an anchor

line had been improperly placed over a spud line. Yoash was stepping over the anchor line at the precise moment the crane was lifting the spud line in order to move the barge. The anchor line, suddenly jerked upward by the rapid movement of the spud line, caught Yoash and threw him against machinery on the deck, injuring his leg.

B.

Against this background I conclude, as other district courts have done, see, Reecer v. McKinnon Brige Co., 745 F. Supp. 485, 491 (M.D. Tenn. 1990); Coats v. Luedtke Eng. Co., 744 F. Supp. 884, 889 (E.D. Wis. 1990), that a jury question is presented as to whether a crane barge like the CAPE FEAR was a "vessel in navigation." Again, I reach this conclusion reluctantly. As I stated

earlier in Presley, 646 F. Supp. at 206 n. 1, "to the extent possible questions of 'status' should be resolved by bright-line tests and not on an ad hoc factual basis." However, in McDermott, 111 S. Ct. at 818, the Supreme Court noted that seaman status under the Jones Act is a mixed question of law and fact reserved for the jury and that the court's role is "to determine if there is a reasonable basis to support the jury's conclusion." See Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1072-73 (5th Cir. 1986) (seaman status not solely a question of law when trial judge cannot state an unvarying rule of law that fits the facts) (quoting Offshore Co. v. Robison, 266 F.2d 769, 779-80 (5th Cir. 1959)). Relevant factors for the jury to consider are the CAPE FEAR's capacity for movement, see Brunet

v. Boh Bros. Constr. Co., 715 F.2d 196, 198 (5th Cir. 1983), the extent to which it was actually used as a means of transportation, see Daniel v. Ergon, Inc., 892 F.2d 403, 408 (5th Cir. 1990), the frequency of movement, see Ellender v. Kiva Constr. & Eng., Inc., 909 F. 2d 803, 808 (5th Cir. 1990); Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 293 (5th Cir. 1990) and the use to which the vessel was being put at the time of the accident, see Ellender, 909 F.2d at 806; Bernard v. Binnings Constr. Co., 741 F. 2d 824, 829 (5th Cir. 1984).

A separate order denying McLean's motion is being entered herewith.

/s/
J. Frederick Motz
United States
District Judge

Date: November 14, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL J. YOASH	*	
v.	*	Civil No. JFM-88-2797
MCLEAN CONTRACTING CO.	*	

****

ORDER

For the reasons stated in the memorandum entered herein, it is this 14th day of November 1991

ORDERED that McLean Contracting company's Motion for summary judgment is denied.

/s/
J. Frederick Motz
United States District Judge

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

No. 92-1080

In The

Supreme Court of the United States

October Term, 1992

WILLIAM STEPHENSON,

Petitioner,

vs.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court ought to grant a Petition for Writ of Certiorari where the decision below lay within the sound discretion of the court and was correctly decided under the legal standards prevailing in all circuits.

AFFILIATED CORPORATIONS

The Respondent is affiliated with no other corporations, except wholly-owned subsidiaries.

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APPENDIX

Appendix A — Federal Rule of Civil Procedure 60 ..... 1a

STATEMENT OF THE CASE

This Petitioner is now before the Court for the second time in this case. Reviewing the chronology, Petitioner was injured on March 26, 1986 and brought suit against his employer, Respondent, under the Jones Act, 46 U.S.C. § 688, and under general maritime law. After trial began but prior to verdict, the trial court granted Respondent's motion for summary judgment on the ground that as a matter of law, Petitioner did not satisfy the third prong of the Jones Act test of seaman status under *Whittington v. Sewer Construction Co.*, 541 F.2d 427 (4th Cir. 1976), because his duties did not serve in aid of navigation or the transportation function of a vessel, and the situs of his injury was non-maritime in nature. *Stephenson v. McLean Construction Co., Inc.*, 702 F. Supp. 552, 554 (D. Md. 1988). As found by the court, Petitioner was working as a welder on a bridge construction project and was generally assigned to perform welding duties on and off the floating barges at the work site. At the time of his injury, Petitioner was doing welding work, not on a barge, but "in a cofferdam, box-like work structure surrounding a concrete foundation embedded in the river bottom." *Id.* at 553.

On appeal, the Fourth Circuit affirmed the decision of the district court, *Stephenson v. McLean Contracting Co., Inc.*, 863 F.2d 340 (4th Cir. 1988). This Court thereafter denied a timely Petition for Writ of Certiorari. *Stephenson v. McLean Contracting Co., Inc.*, 460 U.S. 1085 (1989).

Almost two years elapsed and then this Court, in *McDermott International Inc. v. Wilander*, 111 S. Ct. 807 (1991), resolved the conflicting decisions among the circuit courts of appeal by holding that it was not necessary for a Jones Act plaintiff to show duties in furtherance of the navigation or transportation function of a vessel, as the Seventh Circuit had ruled in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert.*

denied, 469 U.S. 1211 (1985), but merely to demonstrate job activities furthering the purpose of the vessel, which was the test originally adopted by the Fifth Circuit in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

Petitioner then promptly filed a motion under Rule 60(b), F.R.C.P. to set aside the judgment against him and to reopen the case for further proceedings in the light of *McDermott*. After consideration, the district court denied Petitioner's motion on the ground that since Petitioner advanced no other basis, the *McDermott* decision standing along did not represent circumstances of such an unusual or extraordinary nature as to justify overturning a closed and settled judgment (Petitioner's Brief,, A8, *et seq.*). On appeal, the Fourth Circuit sustained the decision of the district court (A1, *et seq.*). This Petition then followed.

SUMMARY OF ARGUMENT

Petitioner attempts to make a specious distinction between "change" in the law and "clarification," as evidenced in this Court's decision in *McDermott International, Inc. v. Wilander, supra*. For reasons Petitioner does not clearly explain, *McDermott* represents more than a mere change or evolution of the law and Petitioner should, therefore, be given an opportunity to reopen the final judgment against him and proceed on the merits under *McDermott*.

The district judge properly held that Petitioner had shown no compelling or extraordinary circumstances justifying relief.

Petitioner then advances an argument that while the decisions below may be a correct application of prior law of the Fourth Circuit, and a majority of the circuits, Petitioner asserts that there is a conflict among the circuits as to whether a change in law,

standing alone, is sufficient justification to set aside a final judgment. Respondent strongly disputes the existence of such a conflict.

Therefore, this case falls within settled policy of the Court denying Petitions in cases involving discretionary rulings of lower courts where only the interest of the litigants is involved.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S GROUNDS FOR RELIEF

Petitioner argues that it is inequitable in this case to refuse to grant the Petition and permit him to go forward on the merits (Brief 16-18), because *McDermott International, Inc. v. Wilander, supra,* represents something more than a mere change in the law and must be given something akin to retroactive effect (Brief 9-11). Petitioner then argues that if *McDermott* signifies only a change in law, there is a conflict among the circuits as to whether that alone justifies the grant of a Rule 60(b)(6) motion (Brief, 11-16, 18).

Respondent is mindful that the Court will intervene in Rule 60(b) cases where it feels manifest and serious injustice has been done, *see, e.g., Klapprott v. United States,* 335 U.S. 601 (1949), but Petitioner must show extraordinary circumstances in order to justify the setting aside of a final judgment. *Ackermann v. United States,* 340 U.S. 193 (1950). The circuit courts of appeal are unanimous that a change in decisional law, without more, will not justify disturbing a final judgment under Rule 60(b)(6).

A. Change Versus Clarification

The courts below found that Petitioner had advanced no basis for disturbing the final judgment in this case other than the fact that

the *McDermott* decision erased that portion of the Jones Act status test which formed the basis of the judgment. Petitioner argues the final judgment against him must be reopened so that *McDermott* be given effect, but, as the Fourth Circuit observed, the *McDermott* decision does not state that it is to apply retroactively (A7). Moreover, Petitioner's argument on this point is obscure. As the district judge noted (A19-21), Petitioner's attempt to buttress his position by claiming that *McDermott* did not change, but instead, clarified the law, really amounts to mere semantics. *Cf. Polites v. United States*, 364 U.S. 426, 433 (1960). In fact, *McDermott* did require a prospective change in the Fourth Circuit's Jones Act status test (A3). *Harwood v. Partredereit*, 944 F.2d 1187 (4th Cir. 1991). The district judge noted that even if the relief were granted, it is not clear that there would be a change in outcome. *See Teamsters, Chauffeurs Local No. 59 v. Superline Transportation Co.*, 953 F.2d 17 (1st Cir. 1992).

What is at work in this case, as in all similar Rule 60(b) cases, is "a healthy respect for the finality of judgments," so that a party seeking Rule 60(b) relief "must bear a heavy burden" because "such relief is extraordinary and may be granted only upon a showing of 'exceptional circumstances'." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3rd Cir. 1977 - *citation omitted*). *Ackermann v. United States*, 340 U.S. 193 (1950). As was noted by the district judge, Petitioner is in no different position than any litigant who has suffered an adverse judgment, after which the law has changed (A21).

Because Petitioner cannot find support for his position, he is then forced to treat *McDermott* as a change or evolution of the law, but mistakenly states that the circuits are in conflict as to the effect of this on final judgments when considering Rule 60(b) motions (Brief 13-16, 18).

II.

NO CONFLICT AMONG THE CIRCUITS EXISTS.

Petitioner concedes that the Second, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits agree that standing alone, a change in the law following a final judgment is not an extraordinary circumstance justifying reopening a final judgment under Rule 60(b)(6) (Brief 15). Although not cited by Petitioner, the First Circuit also follows that rule. *United States v. Belanger*, 598 F. Supp. 598 (D. Me. 1984); *Brown v. Clark Equipment Co.*, 96 F.R.D. 166 (D. Me. 1982). However, Petitioner asserts that the Third and Tenth Circuits would permit a reopening on subsequent change of law (Brief 13).

A. Third Circuit

To support his position, Petitioner cites *Wilson v. Fenton*, 684 F.2d 249 (3rd Cir. 1982), but that case does not prove Petitioner's point, because the court there found that the change in law did not render nugatory the earlier decision of the district judge. The settled authority in the Third Circuit appears to be *Mayberry v. Maroney*, 558 F.2d 1159 (3rd Cir. 1977), in which the Commonwealth of Pennsylvania sought relief, under Rule 60(b)(6), from a consent judgment barring it from certain practices in correctional facilities on the ground that circumstances had changed. The district court granted relief; the Third Circuit reversed holding that the issue under Rule 60(b)(6) "is whether the Commonwealth offered sufficient evidence of circumstances so exceptional that our overriding interest in the finality and repose of judgments may properly be overcome." *Id.* at 1164.

The Third Circuit in the *Mayberry* case also turned aside an argument that a decision of this Court following the entry of the consent order cast doubt on the wisdom of the entry of the order, by stating that even assuming that a change in decisional law had

occurred, "it is settled that Rule 60(b)(5) does not contemplate relief based merely upon precedential evolution." *Ibid.* Since the circuit court considered the case under Rule 60(b)(6) as well, it can be fairly assumed that relief under that subsection would be equally unavailing. *See Seese v. Volkwagenwerk, A.G.*, 679 F.2d 336 (3rd Cir. 1982); *cf. Marshall v. Board of Education*, 575 F.2d 417 (3rd Cir. 1978).

The Third Circuit is, therefore, clearly in line with all other circuits.

B. Tenth Circuit

Petitioner quotes from *Adams v. Merrill Lynch Pierce Fenner and Smith*, 888 F.2d 696 (10th Cir. 1989), a broad statement that a change in relevant case law warrants Rule 60(b)(6) relief. Petitioner does not place that statement in the context of the facts of that case, which, indeed, are critical if the quotation from the decision is to be properly understood.

Adams is a very fact-specific decision. It arose out of suits for violations of federal and state securities law, common law breach of fiduciary duty and of contract, and common law negligence. The brokerage agreements before the court contained arbitration provisions, but the aggrieved investors brought all claims in federal court. The defendant broker moved to compel arbitration and to stay proceedings until the outcome of arbitration. The lower court granted the motion except as to the federal claims which it refused to place over into arbitration, although it did grant the stay as to them.

There the matter rested until, two years later, this Court decided a case which indicated that the refusal to order arbitration of the federal claims was in error. In two separate motions under Rule 60(b)(6), the defendant asked the court to reopen its prior order and to compel arbitration of the federal claims, all of which

were still subject to the stay order. Both motions were ultimately granted by the district judge, and all original claims were then subjected to arbitration. The lower court justified its action based on an evolution of decisional law of this Court, and the Tenth Circuit affirmed.

Note must be taken of two critical points in *Adams*. First, the Rule 60(b)(6) motion was addressed to a *continuing* order of the district judge staying action on the federal claims pending the outcome of arbitration. Therefore, nothing was final, and in fact, the Tenth Circuit noted that an order compelling arbitration is ordinarily not a final order for purposes of appeal, saving only under the peculiar circumstances of that case. *Id.* at 698-9.

Second, the order compelling arbitration did not dispose of the plaintiffs' claims, nor did it decide any issue on the merits; it merely forced the plaintiffs into another forum for the redress of their grievances, a forum which the court found they had agreed to by contract. Since the circuit court noted that arbitration clauses are fair and enforceable, *Id.* at 700, the plaintiffs were clearly not prejudiced by the district court's order compelling arbitration.

Adams is in harmony with decisions from other circuits. For example, as was said in *Ritter v. Smith, supra:*

> Generally courts have refused to undo the past, executed effects of the judgments, but they have, almost uniformly, recognized that it would be unjust to give prospective effect to a judgment now known to be improper.

811 F.2d at 1402. the Fourth Circuit also follows the rule that an order with continuing effect is subject to modification under Rule 60(b)(6) when applicable law changes. *See, e.g., Patterson v. American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980); *E.E.O.C. v.*

Baltimore & Ohio Ry. Co., 557 F. Supp. 1112 (D. Md. 1983).

An examination of other authority from the Tenth Circuit shows that it follows the universal rule that mere change in the law will not support a motion to disturb a final judgment. In *Collins v. City of Wichita*, 254 F.2d 837 (19th Cir. 1958), a case closely on point, in denying a Rule 60(b) motion, the circuit court stated:

> Litigation must end some time, and the fact that a court may have made a mistake in the law when entereing judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside.

Id. at 839. *Accord E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979). *Cf., Fleming v. Gulf Oil Corp.*, 547 F.2d 908 (10th Cir. 1977 — motion granted where lower court had no legal authority to pass original order), and *Pierce v. Cook & Co., Inc.*, 518 F.2d 720 (10th Cir. 1975 — explained as being consistent with the general rule in *Ritter v. Smith, supra*, 811 F.2d at 1403).

The Tenth Circuit, therefore, follows the rule adopted in all other circuits.

C. Eighth Circuit

Petitioner cites *Cox v. Wyrick*, 873 F.2d 200 (8th Cir. 1989), for the proposition that a change in law which is *retroactive* in nature may, under appropriate circumstances, provide the basis for Rule 60(b) relief. This is also the rule in the Fourth Circuit. *Compare United States v. Mandel*, 672 F. Supp. 864 (D. Md. 1987 — writ of error *coram nobis* granted where retroactive change of law rendered prior judgment void), *with Hall v. Warden*, 364 F.2d 495 (4th Cir. 1966 — Rule 60(b) motion denied where judgment final and change of law was not retroactive).

Cox, therefore, represents no departure from the general rule. In fact, the Eighth Circuit follows all other circuits in denyng relief under Rule 60(b) where the only grounds advanced for disturbing a final judgment is that the law has subsequently changed. *Carter v. Romines*, 593 F.2d 823 (8th Cir. 1979).

There is, therefore, no circuit court of appeals which does not follow the general rule, and thus there is no conflict among the circuits for the Court to resolve.

III.

POLICY OF THIS COURT REQUIRES DENIAL.

The courts below found that Petitioner's Rule 60(b) motion proceeded under subsection (6), which invokes the exercise of sound judicial discretion by the district judge, restricting appellate review to whether the district court abused its discretion. *See, e.g., United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657 (1st Cir. 1990); *Wilson v. Fanton*, 684 F.2d 249 (3rd Cir. 1982); *Hensley v. Chesapeake & Ohio Ry. Co.*, 651 F.2d 226 (4th Cir. 1981); *Fackelman v. Bell*, 564 F.2d 734 (5th Cir. 1977); *McKnight v. United States Steel Corp.*, 726 F.2d 333 (7th Cir. 1984); *Mohammed v. Sullivan*, 866 F.2d 258 (8th Cir. 1989); *Tomlin v. McDaniel*, 865 F.2d 209 (9th Cir. 1989); *Adams v. Merrill, Lynch, Pierce, Fenner & Smith*, 888 F.2d 696 (10th Cir. 1989); *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987).

Since there is no conflict among the circuits for the Court to resolve, the Petition ought to be denied under the long-standing policy of this Court of avoiding decisions which impact only a particular litigant. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Stated differently, were the Petition to be granted, the Court would find itself in the position of reviewing an action of the district judge which involved the exercise of sound judicial

discretion, a matter which the Court ordinarily has treated with deference. *See, e.g., Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990). *See Mitchell v. Hobbs*, 951 F.2d 417, 420 (1st Cir. 1991) — review of Rule 60(b) decision); *Heat and Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986 — review of discretionary decision to quash a subpoena).

The absence of a conflict among the circuits removes any real purpose for the granting of the Petition in this case. In *Layne & Bowler Corporation v. Western Well Works, Inc.*, 361 U.S. 387 (1923), a patent infringement case, this Court had granted a petition for writ of certiorari in order to resolve an apparent conflict among circuits. The Court found in that case that the conflict was more apparent than real, and dismissed the writ accordingly, thus the language of Chief Justice Taft's opinion applies with equal force in the present case:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

261 U.S. at 393. See also Justice Frankfurter's dissent in *McAllister v. United States*, 348 U.S. 19, 25 (1954). Because there is no conflict among the circuits for the Court to resolve, and because this case involves only a single litigant and no broad public policy or interest is present, the Court ought to deny the Petition. Additionally, the decision of the district judge was entirely in harmony with the decisions of all the circuits, so that there is nothing for the Court to correct were it to grant the Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari not be granted.

Respectfully submitted,

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APPENDIX A — FEDERAL RULE OF CIVIL PROCEDURE 60

RULE 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, order or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistakes, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a

defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.